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# Identity and Federalism: Understanding the Implications of *Daniels v. Canada*

Thomas Isaac and Arend Hoekstra<sup>\*</sup>

“As the curtain opens wider and wider on the history of Canada’s relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought” ... “This case represents another chapter in the pursuit of reconciliation and redress in that relationship”. With these words Justice Abella set the tone of *Daniels v. Canada (Indian Affairs and Northern Development)*<sup>1</sup> (“*Daniels*”); a decision that restates settled law, reframes core elements of Indigenous identity, and contributes to the recent resetting of the framework for how the federal and provincial governments approach reconciliation with Indigenous peoples.

On its face, *Daniels* is not so much new law, but rather a restatement of the law which raises more questions requiring further judicial guidance. The Court declined to make two of the three declarations requested by the appellants on the grounds that the law was already clear and settled. The remaining issue, a request for a declaration that non-status Indians and Métis peoples were included in the definition of ‘Indian’ for the purposes of section 91(24) of the *Constitution Act, 1867*,<sup>2</sup> was only partially contested, with the Crown (as respondent) conceding the inclusion of non-status Indians during oral arguments.

In making the requested declaration, the Court may have intended only to clarify and end the “jurisdictional tug-of-war in which [impacted] groups were left wondering about where to turn for policy redress”,<sup>3</sup>

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<sup>1</sup> [2016] S.C.J. No. 12, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 1 (S.C.C.) [hereinafter “*Daniels*”].

<sup>2</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [hereinafter “*Constitution Act, 1867*”].

<sup>3</sup> *Daniels, supra*, note 1, at para. 15.

however the Court's approach in doing so has given rise to new questions about the scope and definition of 'Indigenous peoples' and the nature and purpose of the Crown's role in reconciliation with Indigenous peoples.

*Daniels* will significantly impact the practicalities of reconciliation. The Court dismisses any distinction between status and non-status peoples and, by implication, raises fundamental questions about Canada's current approach to managing its obligations to Aboriginal peoples (including, as set out in the *Indian Act*<sup>4</sup>). *Daniels* is also further evidence that the Court no longer prioritizes federal supremacy with regard to section 91(24) and interactions with Aboriginal peoples. Along with recent jurisprudence in *Grassy Narrows First Nation v. Ontario (Natural Resources)*<sup>5</sup> ("Grassy Narrows"), *Tsilhqot'in Nation v. British Columbia*<sup>6</sup> ("Tsilhqot'in Nation") and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*,<sup>7</sup> ("Kitkatla"), *Daniels* makes clear that principles of federalism and reconciliation require the federal and provincial governments to act jointly in relation to Indigenous peoples, prompts questions as to why the federal government replicates provincial-type services exclusively for Inuit and status 'Indians' under the *Indian Act* and not for other 'Indians' within the meaning of section 91(24), and raises questions about the appropriate role of provincial governments when considering the needs and rights of Indigenous peoples.

## I. THE DECISION

In *Daniels*, the Court was asked to make three declarations: (1) "that Métis and non-status Indians are 'Indians' under section 91(24), (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples".<sup>8</sup>

Before considering the first declaration, the Court examined whether such a declaration would have practical utility in order to "settle a 'live

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<sup>4</sup> R.S.C. 1985, c. I-5 [hereinafter "*Indian Act*"].

<sup>5</sup> [2014] S.C.J. No. 48, 2014 SCC 48, [2014] 2 S.C.R. 447 (S.C.C.) [hereinafter "*Grassy Narrows*"].

<sup>6</sup> [2014] S.C.J. No. 44, 2014 SCC 44, [2014] 2 S.C.R. 256 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

<sup>7</sup> [2002] S.C.J. No. 33, 2002 SCC 31, [2002] 2 S.C.R. 146 (S.C.C.) [hereinafter "*Kitkatla*"].

<sup>8</sup> *Daniels*, *supra*, note 1, at para. 2.

controversy’ between the parties”,<sup>9</sup> a criterion in making such a declaration. Both federal and provincial governments had denied responsibility for Métis and non-status Indians, leaving the affected Indigenous groups in a “jurisdictional wasteland with significant and obvious disadvantaging consequences”.<sup>10</sup> The Court found that a declaration would provide practical utility by allowing certainty for impacted Indigenous groups, rather than leaving them to “rely more on noblesse oblige than on what is obliged by the Constitution”.<sup>11</sup>

Given the Crown’s concession that non-status Indians were subject to section 91(24), the Court focused its analysis on whether Métis were also subject to section 91(24). The Court found evidence that ‘Indians’ had “long been used as a general term referring to all Indigenous peoples, including mixed ancestry communities”.<sup>12</sup> Before and after confederation the government frequently classified Aboriginal peoples with mixed-ancestry peoples, and would routinely include Métis communities in treaties.<sup>13</sup> Perhaps most striking, the trial judge found that the *Constitution Act, 1867* was drafted with the intention of constructing a railway across Canada, and as a consequence, the federal government was given powers to manage western communities of Aboriginal peoples and Métis and to address any resistance they might incite against a railway.<sup>14</sup>

While Métis do not identify as ‘Indians’, they possess distinct cultures, and are a distinct Aboriginal peoples.<sup>15</sup> This does not preclude them from inclusion under section 91(24). In *Reference re: British North America Act, 1867 (U.K.), s. 91*<sup>16</sup> (“*Re Eskimo*”) the Court found that “while the Inuit [similarly] had their own language, culture and identities separate from that of the ‘Indian Tribes’ ... they were ‘Indians’ under s. 91(24)”.<sup>17</sup>

Similarly, mixed-ancestry does not preclude such persons from inclusion within section 91(24), as the Court’s determination in *Attorney General of Canada v. Canard*<sup>18</sup> “shows that intermarriage and mixed-

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<sup>9</sup> *Id.*, at para. 11.

<sup>10</sup> *Id.*, at para. 14.

<sup>11</sup> *Id.*, at para. 12.

<sup>12</sup> *Id.*, at para. 23.

<sup>13</sup> *Id.*, at para. 24.

<sup>14</sup> *Id.*, at para. 25.

<sup>15</sup> *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation within Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision*, at 6, online: <[https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/report\\_reconciliation\\_1471371154433\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/report_reconciliation_1471371154433_eng.pdf)> [hereinafter “*Métis MSR*”].

<sup>16</sup> [1939] S.C.J. No. 5, [1939] S.C.R. 104 (S.C.C.) [hereinafter “*Re Eskimo*”].

<sup>17</sup> *Daniels*, *supra*, note 1, at para. 39.

<sup>18</sup> [1975] S.C.J. No. 26, [1976] 1 S.C.R. 170 (S.C.C.).

ancestry do not preclude groups from inclusion under s. 91(24)).<sup>19</sup> To be clear, while the Court refers to ‘mixed-ancestry’ throughout *Daniels*, we know from the Court’s earlier decision in *R. v. Powley*,<sup>20</sup> (“*Powley*”) and others, that mixed-ancestry, by itself, is only one attribute of making up the distinct nature of Métis peoples under section 35.

Despite the lack of “consensus on who is considered Métis or a non-status Indian”,<sup>21</sup> the Court found that “historical, philosophical, and linguistic context establish that ‘Indians’ in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis”.<sup>22</sup>

For the purpose of determining whether a Métis *individual* is subject to section 91(24), the Court determined that only the first two parts of the *Powley*<sup>23</sup> test are relevant, specifically, that: (1) the individual self-identify as Métis, and (2) they have an ancestral connection to an historic Métis community.<sup>24</sup> The third criterion, that the individual be accepted by a community, was rejected as it risked excluding those who were no longer accepted by their community.<sup>25</sup>

Having concluded that ‘Indian’ in section 91(24) is a broad term which includes Métis and non-status Indians, the Court noted that ‘Indians’ for the purpose of section 91(24) is different than the use of ‘Indian’ in section 35 of the *Constitution Act, 1982*<sup>26</sup> which refers instead to ‘Indian bands’,<sup>27</sup> meaning First Nations.

Having determined that the first declaration should be granted, the Court considered the second: that the Crown owes a fiduciary duty to Métis and non-status Indians. The Court identified *Delgamuukw v. British Columbia*<sup>28</sup> as already defining the fiduciary duty of the Crown, and *Manitoba Métis Federation Inc. v. Canada (Attorney General)*<sup>29</sup> as supporting the extension of the fiduciary duty to Métis. As a consequence, the Court rejected the second declaration on the basis that it restated settled law.<sup>30</sup>

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<sup>19</sup> *Daniels*, *supra*, note 1, at para. 41.

<sup>20</sup> [2003] S.C.J. No. 43, 2003 SCC 43, [2003] 2 S.C.R. 2007 (S.C.C.) [hereinafter “*Powley*”].

<sup>21</sup> *Daniels*, *supra*, note 1, at para. 17.

<sup>22</sup> *Id.*, at para. 19.

<sup>23</sup> *Powley*, *supra*, note 20.

<sup>24</sup> *Daniels*, *supra*, note 1, at para. 48.

<sup>25</sup> *Id.*, at para. 49.

<sup>26</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>27</sup> *Daniels*, *supra*, note 1, at para. 35.

<sup>28</sup> [1997] 3 S.C.R. 1010, [1997] 3 S.C.R. 1010 (S.C.C.).

<sup>29</sup> [2013] S.C.J. No. 14, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.).

<sup>30</sup> *Daniels*, *supra*, note 1, at para. 53.

The third declaration sought, that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government, on a collective basis,<sup>31</sup> was also rejected, as it was already addressed in *Haida Nation v. British Columbia (Minister of Forests)*<sup>32,33</sup> (“*Haida Nation*”).

### 1. Findings of the Court

The findings of the Court were not unexpected. While the Court did not deliberate on the inclusion of non-status Indians in section 91(24) as it was conceded by Canada, it was nearly certain that the outcome would reflect the principle of constitutional supremacy. The determination of ‘status’ is governed by the *Indian Act*, a federal legislative creation flowing from Parliament’s authority under the *Constitution Act, 1867*, and unlikely to govern the interpretation of the *Constitution Act, 1867*.

With regard to the inclusion of Métis, the Court’s decision was almost assured given the historical reality of the Métis, the Métis’ inclusion in some treaties and the judicial precedent of the Inuit being included within the term ‘Indian’ in *Re Eskimo*. Though interpreted separately, for practical purposes the Court was also likely to include in section 91(24) the same Indigenous peoples listed in section 35; providing the same rights to Aboriginal peoples, but different methods of obtaining and practising those rights would have certainly created disparity of circumstance between Aboriginal peoples, increased the challenge of reconciliation, created unnecessary redundancies, and made it more challenging for Aboriginal peoples to exercise their section 35 rights.

The Court was similarly cautious when rejecting the second and third declarations. Not only were both these declarations unnecessary as they were addressed by settled law, the declarations were fundamentally related to section 35 rights rather than section 91(24); any potential conflation of these constitutional provisions could impact the expectations of Indigenous peoples (including Aboriginal peoples) and the Crown, potentially impeding reconciliation.

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<sup>31</sup> The Court did not specifically address the assertion that there is an obligation to negotiate, in good faith. Such an assertion was not clearly made in *Haida Nation*. It will be interesting to see whether the Court asserts the existence of this duty in the future.

<sup>32</sup> [2004] S.C.J. No. 70, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter “*Haida Nation*”].

<sup>33</sup> In *Haida Nation*, the Court determined that to fulfil the honour of the Crown, the Crown must consult with, and where appropriate, accommodate Aboriginal peoples whenever Crown action could adversely impact Aboriginal or treaty rights.

## 2. Indigenous Roots

One of the most striking aspects of *Daniels* is not the conclusion of the Court, but rather the words the Court employed in reaching its conclusion. While the Court's prior use of the term 'indigenous' was sparse, *Daniels* represents the first material use of the term, core to the central analysis and reasoning set out in *Daniels*. The Court used the noun 'Indigenous' five times in *Daniels*.<sup>34</sup> Prior to *Daniels*, the Court has only used the term 'indigenous' in an Aboriginal law context eight other times, and each time as an adjective (as in 'indigenous groups') rather than a proper noun.<sup>35</sup>

The Court has increasingly used the adjective 'indigenous' in recent years: it was used first in 1973 in *Calder v. British Columbia (Attorney General)*,<sup>36</sup> used sparingly in the 1990s and early 2000s, before being employed five times in *Tsilhqot'in Nation*.

The Court's use of the noun 'Indigenous' in *Daniels* is likely purposeful. Not only is it used as a proper noun for the first time by the Court, it is employed from the opening sentence, drawing attention to the 'inequities' suffered by Indigenous peoples, and the need for redress.<sup>37</sup>

### (a) What's in a Name?

The term 'Indigenous' in *Daniels* is used in such diverse settings as to allow for a general definition to be construed. The Court's use of 'Indigenous' is broad. Three of the five times it is used, 'Indigenous' is prefaced by 'all', suggesting that it is intended as a general, rather than a specific classification. This general category of 'Indigenous' peoples includes First Nations, Inuit, non-status Indians, Métis and what the Court refers to as 'mixed-ancestry' communities:

'Indians' has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. The term

<sup>34</sup> *Daniels*, *supra*, note 1, at paras. 1, 6, 9, 14, 23.

<sup>35</sup> See *Mitchell v. Canada (Minister of National Revenue)*, [2001] S.C.J. No. 33, 2001 SCC 33, [2001] 1 S.C.R. 911 (S.C.C.); *R. v. Marshall*, [2005] S.C.J. No. 44, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, [2014] 2 S.C.R. 256 (S.C.C.); *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139 (S.C.C.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.); *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.); *Calder v. British Columbia (Attorney General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 (S.C.C.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.).

<sup>36</sup> *Id.*

<sup>37</sup> *Daniels*, *supra*, note 1, at para. 1.

was created by European settlers and applied to Canada's Aboriginal peoples without making any distinction between them.<sup>38</sup>

In referring to the trial judge's conclusion, the Court also framed 'Indigenous' as including non-status Indians and Métis when it stated that "'Indians' under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis". While the Court frames this statement as simply a paraphrasing of the Federal Court, the trial decision never employed 'Indigenous' as a proper noun or in describing a broader classification of peoples.

Despite these uses, there remains some uncertainty with regard to the meaning of 'Indigenous'. The trial judge's restated determination, above, would limit 'Indigenous' to only section 35 Aboriginal peoples, however the Court never makes this statement on its own behalf, leaving the door open to the possibility that 'Indigenous' includes other peoples in addition to those included in section 35. Indeed, the Court's use of 'Indigenous' is entirely expansive: while being clear that 'Indigenous' means Indians (including non-status Indians), Métis, Inuit, and 'mixed-ancestry', at no point does the Court limit inclusion in the term.

One potential area for expansion in the scope of the category of 'Indigenous' beyond Aboriginal peoples for the purposes of section 35 is in the definition of Métis. While the Court requires that Métis individuals subject to section 91(24) meet a modified *Powley* test, the amended test has the potential of significantly expanding those defined as Métis for the purposes of section 91(24) as opposed to section 35.

It is also likely that 'Indigenous', as used in *Daniels*, includes peoples who consider themselves to be of 'mixed-ancestry' or individuals who have ancestral connections to the communities included in section 91(24) but who do not identify themselves with any particular community.

Finally, there is a possibility that, as will be discussed later, 'Indigenous' is a category which includes not only section 91(24) peoples, but also encompasses all peoples who have an ancestral connection to Indigenous communities and even those who, without definitive evidence, self-identify as 'Indigenous'.

*(b) Purpose of 'Indigenous'*

In addition to uncertainty over the scope of 'Indigenous' as a category, the Court's purpose in employing the term also remains

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<sup>38</sup> *Id.*, at para. 23.



unclear. As will be discussed later, ‘Indigenous’ has a meaning within the framework of the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>39</sup> (“UNDRIP”), potentially leaving the door open to some form of reconciliation between existing Canadian law and future implementation of UNDRIP.

The Court may have intended to introduce the term ‘Indigenous’ as a larger and more flexible category than Aboriginal peoples, which would encompass all section 91(24) individuals. The Court has traditionally used ‘Aboriginal peoples’ as a synonym for those individuals endowed with section 35 rights, a definition that is construed from the text of section 35(2) of the *Constitution Act, 1982*. With its conclusion in *Daniels*, the Court identified a distinct and broader category of Indigenous peoples who are subject to section 91(24). Since section 91(24) peoples include all Aboriginal peoples, a definition for section 91(24) peoples would have naturally worked as a general and broader category to encompass all constitutionally included peoples. This approach was foiled however, as section 91(24) already comes with a definition for this larger category: ‘Indian’. The Court’s recognition that ‘Indian’ already has a distinct and much more narrow definition under section 35 may also be an acknowledgement that a larger definition is necessary. The Court may have addressed this problem by employing the noun ‘Indigenous’.

It is also possible that ‘Indigenous’ is indeed broader still, encompassing both constitutionally included Aboriginal peoples and others. Such a definition would have a limited legal purpose, but would be a practical tool of the Court. The categories of peoples included in section 35 and section 91(24) will necessarily have limits, and at some point, the Court will need to determine whether someone is or is not ‘Aboriginal’ or ‘Indian’ within the meaning of section 91(24). Using the term ‘Indigenous’ may be a way of respecting an individual’s or a community’s identity despite excluding them from constitutionally defined categories. This potential use of ‘Indigenous’ would be consistent with the Court’s emphasis on “the pursuit of reconciliation and redress”<sup>40</sup> in the relationship between Canada and its Indigenous peoples, albeit with a likely consequence of causing greater uncertainty and confusion, and raising more questions around Indigenous identity and its meaning from a legal and policy perspective.

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<sup>39</sup> *United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly, A/RES/61/295, UNGAOR, 61st Sess. (2007)*, online: United Nations High Commissioner for Refugees <<http://www.refworld.org/docid/471355a82.html>> [hereinafter “UNDRIP”].

<sup>40</sup> *Daniels, supra*, note 1, at para. 1.

Finally, the distribution of ‘Indigenous’ throughout *Daniels* may provide insights into its intended meaning. ‘Indigenous’ appears predominantly at the beginning of *Daniels*, with three-fifths of its occurrence within the first 16 per cent of the text, four-fifths occurring in the first quarter of the text, and no instance of ‘Indigenous’ appearing in the second half of *Daniels*.<sup>41</sup> This distribution suggests that the Court may not have intended for the term ‘Indigenous’ to be legally significant, but instead to act as a term of convenience. Once the Court advanced its discussion and began to examine specific classes of Indigenous peoples for the purpose of section 91(24) including Métis and non-status Indians, the Court ceased to use ‘Indigenous’ as a noun or an adjective. The Court’s restraint from using ‘Indigenous’ within its conclusions and much of its analysis somewhat undermines the proposition that the Court intended for ‘Indigenous’ to have a legally significant meaning and instead lends credence to the proposition that ‘Indigenous’ is used as a category of convenience. ‘Indigenous’ may not be the only category of convenience employed by the Court; the Court’s statement that “‘Métis’ can ... be used as a general term for anyone with mixed European and Aboriginal heritage”, when discussing peoples included in section 91(24), appears to create an alternative definition of ‘Métis’ that differs from the Court’s earlier guidance that Métis under section 35 are distinct Aboriginal peoples not defined solely by their mixed-ancestry.<sup>42</sup>

The resulting challenge is that without express guidance from the Court, readers of *Daniels* are left with a spectrum of alternatives, both to the meaning of the term ‘Indigenous’, and to the purposes for which the Court intends ‘Indigenous’ to be used. This is not a particularly helpful proposition given the dynamic state of Aboriginal relations in Canada today.

*(c) Continuing Questions re ‘Indigenous’*

With regard to the category ‘Indigenous’, as discussed, *Daniels* raises more questions than it addresses. As set out below, the first and most relevant question for those looking to use the term ‘Indigenous’, is whether it is intended only to include those peoples subject to section 91(24) (including, necessarily those peoples subject to section 35), or whether others may be included? Similarly, does the Court intend for

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<sup>41</sup> Calculations made on the basis of paragraphs within *Daniels*. Occurrences of ‘Indigenous’ were at paras. 1, 6, 9, 14, and 23.

<sup>42</sup> *Métis MSR*, *supra*, note 15, at p. 15.

‘Indigenous’ to be a legally determinable category, or is it instead intended as an entirely subjective category whereby anyone can identify as ‘Indigenous’? Finally, what is the legal purpose of ‘Indigenous’, if any? Is ‘Indigenous’ only a category of convenience, or does it have implications within the broader framework of reconciliation and the honour of the Crown?

### 3. An All-Inclusive Category

Concerns about the scope of ‘Indigenous’ would become redundant if section 91(24) itself acted as a broad, wholly encompassing definition for Indigenous peoples. The Court in *Daniels* leaves this as a distinct possibility.

By constricting the *Powley* test, the Court expands the inclusion of Métis for the purposes of section 91(24). The test as set out in *Powley* and summarized in *Daniels* “for defining who qualifies as Métis for the purposes of s. 35(1) [is]:

1. Self-identification as a Métis;
2. An ancestral connection to an historic Métis community; and
3. Acceptance by the modern Métis community.”<sup>43</sup>

Since section 91(24) is “about the federal government’s relationship with Canada’s Aboriginal peoples”,<sup>44</sup> including “people who may no longer be accepted by their communities”,<sup>45</sup> the Court found that the third step of the *Powley* test should be eliminated when concluding on inclusion as Métis under section 91(24).

On its face, the restriction of the *Powley* test does appear to only impact those who are alienated by their community, but Part Three, as set out in *Powley* also includes a requirement that “the modern community [have] continuity with the historic community”.<sup>46</sup> The result is to do away with community-based rights and identity<sup>47</sup> and move towards a framework based solely on ancestral connection (be it by “birth, adoption, or other means”<sup>48</sup>). This is a material alteration of the definition

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<sup>43</sup> *Id.*, at para. 48.

<sup>44</sup> *Id.*, at para. 49.

<sup>45</sup> *Id.*

<sup>46</sup> *Powley*, *supra*, note 20, at para. 33.

<sup>47</sup> *Id.*, at para. 22.

<sup>48</sup> *Id.*, at para. 32.

of Métis, not only because it may significantly increase those included in the category, but also because it may become significantly more difficult to establish or dismiss claims of inclusion. Finally, though unchanged from *Powley*, the availability of ‘other means’ by which ancestry can be demonstrated, in tandem with eliminating a requirement for continuity with a historic community, creates the possibility of additional difficult-to-disprove claims of Métis identity and the potential for a significant expansion of the category of Métis. This definition of Métis appears to run counter to the definition in *Powley* where it was noted that Métis are not all mixed-ancestry peoples, but rather peoples who have, in addition to their mixed ancestry, “developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears”,<sup>49</sup> and has the potential of materially expanding the number of individuals included under the term ‘Métis.’

The Court’s inclusion of non-status Indians in section 91(24) was also determined with what appears to be little concern for the potential breadth of eligible participants. The Court recognized that the term ‘non-status Indian’ was imprecise as it “can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government”.<sup>50</sup> The Court’s reference to ‘mixed communities’ suggests that there could be non-Métis, non-section 35 Indian individuals who are included in section 91(24). The phrase ‘mixed communities’ rather than ‘mixed ancestry communities’, may also signify that the Court is less concerned about cultural or historic elements of Indigenous identity. The Court expressly states that the term ‘Indians’ as used in section 91(24), has been associated with “all Indigenous peoples, including mixed-ancestry communities like the Métis”.<sup>51</sup> The Court’s phrasing leads by necessity to the conclusion that other mixed-ancestry communities who do not qualify as Métis under the abbreviated *Powley* test may still fall under section 91(24).

In setting the scope for section 91(24), the Court appears to show little concern for imprecise categories, finding that “there is no consensus on who is considered Métis or a non-status Indian, nor need there be”.<sup>52</sup> Again, this appears to contradict, at least for the purposes of section 35, the Court’s previous findings that Métis peoples are distinct Aboriginal

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<sup>49</sup> *Powley*, *supra*, note 20, at para. 10.

<sup>50</sup> *Daniels*, *supra*, note 1, at para. 18.

<sup>51</sup> *Id.*, at para. 23 (emphasis added).

<sup>52</sup> *Id.*, at para. 17.

peoples with distinct cultures and traditions. Beyond imprecision, the Court's actions also appear to embrace general uncertainty; both the expanded definition of Métis and the flexible approach to determining Indians for the purposes of section 91(24) are likely to result in scenarios where proving eligibility is difficult or impossible. Like the use of 'Indigenous', the Court does not explain the scope of section 91(24).

*(a) What Does it Mean?*

Based on the overall tone and structure of *Daniels*, it is arguable that the Court has intentionally placed minimal restrictions on the scope of section 91(24). Since section 91(24) is not a rights-bearing provision, the Court may perceive it instead to be a practical tool for reconciliation. By explicitly confirming that section 91(24) does not create a duty to legislate,<sup>53</sup> the Court was left with two potential applications for the provision: (i) ensuring that the rights of section 35 Aboriginal peoples are appropriately protected and addressed, and (ii) furthering reconciliation. The Court's frequent reference to past injustices, including the operations and legacy of residential schools,<sup>54</sup> may suggest one objective of a broad definition: ensuring that all individuals harmed by the actions of the Crown as a consequence of their identity as or their ancestors' affiliation with Indigenous peoples can seek redress from the federal government. This suggestion lends support for the abbreviation of the *Powley* test and the inclusion of individuals not otherwise affiliated with an Indigenous community: while Aboriginal rights are typically held and exercised collectively,<sup>55</sup> Canada's legacy with Indigenous peoples has often resulted in harm to individuals.

This broad definition of section 91(24) may therefore serve as an envelope with which to aggregate all those who seek reconciliation with the Crown for reasons associated with their Indigenous heritage, without requiring proof of Aboriginal rights, which may be both impossible and irrelevant to the objective of redress. Unfortunately, the use of the term 'Métis' as referring to both Métis section 35 rights-bearing peoples and other 'Métis' under section 91(24) only adds to the confusion and may

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<sup>53</sup> *Id.*, at para. 15.

<sup>54</sup> *Id.*, at paras. 1, 28-30, 49.

<sup>55</sup> *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, at para. 68 (S.C.C.) [hereinafter "*Sparrow*"].

fundamentally contradict the Court's earlier findings and reasoning on why Métis peoples are a distinct Aboriginal peoples in Canada.

#### 4. Future Implications — UNDRIP

The most apparent implication of *Daniels*, besides providing certainty for Indigenous peoples, is the importation of the term 'indigenous' into Canadian law. The Court's increasing use of the term and its prominent employment in *Daniels*, during a time when speculation of how Canada will implement UNDRIP had returned to the news cycle,<sup>56</sup> may feed speculation that the Court is anticipating UNDRIP's adoption into Canadian law.

UNDRIP was endorsed by Canada in 2010 but has not been ratified into domestic legislation.<sup>57</sup> UNDRIP is a blunt tool not easily connected to Canada's existing, sophisticated and rapidly developing section 35 legal framework for recognizing and protecting Aboriginal and treaty rights. It is not clear how UNDRIP could be incorporated into Canadian law without significantly altering the existing law relating to Canada's Indigenous peoples, as it includes the requirement to obtain "free, prior and informed consent before adopting and implementing legislative or administrative measures that may impact [Indigenous peoples]"<sup>58</sup> as well as a stipulation that "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise acquired".<sup>59</sup> These broad provisions carry the potential of significantly altering existing rules around rights recognition and consultation set out in *Haida Nation* and Aboriginal title, as recently discussed in *Tsilhqot'in Nation*.

The Court's use of the term 'Indigenous' appears to have a fundamentally different purpose than the use of the word 'Indigenous' in UNDRIP. *Daniels* employs 'Indigenous' as a broad term which is likely synonymous, or potentially broader than, the category described in section 91(24). The overall use of 'Indigenous' within *Daniels* appears as a way of framing both section 35 rights-holding Indigenous peoples and non-section 35 rights-holding Indigenous peoples. The term 'Indigenous' in UNDRIP is used primarily as a way of identifying rights-holders.

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<sup>56</sup> "Canada and UNDRIP: Q&A with Minister Bennett's Office", online: (2016) Northern Public Affairs <<http://www.northernpublicaffairs.ca/index/canada-and-undrip-qa-with-minister-bennetts-office/>>.

<sup>57</sup> Thomas Isaac, *Aboriginal Law*, 5th ed. (Toronto: Thomson Reuters, 2016), at p. 62.

<sup>58</sup> UNDRIP, *supra*, note 39, at Article 19.

<sup>59</sup> *Id.*, at Article 26.1.

In many ways, UNDRIP is inconsistent<sup>60</sup> with current Canadian jurisprudence; to apply UNDRIP to all ‘Indigenous’ peoples would add to this inconsistency. For example, on its face, the duty to consult under UNDRIP is broader, though lacking any legal context, than that elucidated in *Haida Nation*, and expanded upon in other Court decisions,<sup>61</sup> which provide a spectrum of obligations for consultation, but which, where rights are unproven, is unlikely to require consent from the impacted Aboriginal Peoples.<sup>62</sup> Similarly, UNDRIP’s stipulation that lands be returned to Indigenous peoples, with no other material legal context, is inconsistent with Canada’s relatively sophisticated existing legal framework on these matters and case law relating to Aboriginal title.<sup>63,64</sup>

On its face, the term ‘Indigenous’ appears to have been used without consideration of UNDRIP. If UNDRIP is ever incorporated into Canadian law, the use of ‘Indigenous’ in *Daniels* could be applied as a tool of interpretation, which would likely result in outcomes not anticipated or intended by the Court or governments.

## 5. Future Implications — Reconciliation

Perhaps the most interesting implication of *Daniels* is its meaning for reconciliation. The Court in *Daniels* framed its decision around reconciliation stating that “this case represents another chapter in the

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<sup>60</sup> ‘Inconsistent’ does not in any way suggest that Canadian jurisprudence is deficient or does not provide material protections to Aboriginal peoples’ constitutionally protected rights from unilateral state actions, both objectively and in comparison with other nation states that have Indigenous populations.

<sup>61</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, 2004 SCC 74 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, 2005 SCC 69 (S.C.C.); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650, 2010 SCC 43 (S.C.C.); *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, [2010] 3 S.C.R. 103, 2010 SCC 53 (S.C.C.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40 (S.C.C.); *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] S.C.J. No. 41, 2017 SCC 41 (S.C.C.).

<sup>62</sup> *Haida Nation*, *supra*, note 32, at para. 48.

<sup>63</sup> Jack Woodward, *Native Law* (Toronto: Thomson Reuters, 2016) (looseleaf revision 2016-6), ch. 2 at 2§1090 (Proview).

<sup>64</sup> In *Tsilhqot’in Nation*, the Court found that Aboriginal title could be infringed for a variety of reasons, including many of the current uses of Canadian land today, such as “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims” [*Tsilhqot’in Nation*, *supra*, note 6, at para. 83].

pursuit of reconciliation and redress in that relationship”,<sup>65</sup> but interestingly, the ‘reconciliation’, as framed by the Court is between Canada and its Indigenous peoples.<sup>66</sup> Until now, the Court has framed reconciliation in relation to section 35.<sup>67</sup> That framing made sense: “aboriginals lived on the land in distinct societies, with their own practices, traditions and cultures”<sup>68</sup> before the imposition of the sovereignty of the Crown. Consequently, in order to respect this prior existence, the Crown must limit its activities where they would impact the “practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with Europeans”.<sup>69</sup>

(a) *What is Section 91(24) Reconciliation?*

*Daniels* expands reconciliation beyond its previous focus on section 35 rights. By explicitly expanding section 91(24) beyond the scope of section 35 rights-holders, the Court has created a category of non-section 35 rights-holders for whom the federal Crown may legislate and infers potential obligations by stating that the purpose of the declaration is to provide clarity for section 91(24) peoples looking for redress.<sup>70</sup>

Reconciliation appears to be different for the purposes of section 91(24) than for the purposes of section 35. First, section 35 requires a reconciliation of Aboriginal peoples with the Crown. This reconciliation recognizes that Aboriginal and treaty rights are held by Aboriginal communities,<sup>71</sup> and that reconciliation involves maintaining a framework in which separate systems and cultures can co-exist.<sup>72</sup> *Daniels*, however, expands section 91(24) to include individuals who are not associated with a community.<sup>73</sup> Section 35 reconciliation is not possible between the Crown and individuals: practically, the Crown cannot accommodate an indeterminate number of individuals with individually unique rights; consultation, a hallmark of reconciliation, is not possible as a duty owed to individuals; and it would be challenging for individuals to assert unique

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<sup>65</sup> *Daniels*, *supra*, note 1, at para. 1.

<sup>66</sup> *Id.*

<sup>67</sup> *Van der Peet*, *supra*, note 35, at para. 31.

<sup>68</sup> *Id.*, at para. 44.

<sup>69</sup> *Id.*

<sup>70</sup> *Daniels*, *supra*, note 1, at para. 15.

<sup>71</sup> *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 35 (S.C.C.).

<sup>72</sup> *Van der Peet*, *supra*, note 35, at para. 44.

<sup>73</sup> *Daniels*, *supra*, note 1, at para. 49.



rights or surrender rights in a meaningful way, particularly given that section 35 rights are collective in nature.

Second, ‘redress’, as used by the Court in *Daniels*, does not appear to refer to Aboriginal rights. Aboriginal rights require reconciliation because they not only existed, but will continue to exist, conceivable for so long as the Crown exercises sovereignty. ‘Redress’ alternatively is a backwards-looking noun meaning to seek relief or a remedy.<sup>74</sup> ‘Redress’ therefore must have been triggered by an historic wrong, and must be remediable through an action in the present. Such wrongs likely include the residential school system which, as noted previously, the Court refers to repeatedly in *Daniels*.

Finally, the Court’s use of the term ‘policy redress’<sup>75</sup> may distinguish section 91(24) from the legal redress framework in section 35. ‘Policy redress’, as compared with legal redress, may imply the desire for dialogue between Indigenous peoples and the federal government, sensitive to a spectrum of competing needs and interests, without the imposition of strict legal obligations on the federal government and without fettering the ability of provincial governments to govern.

It appears that reconciliation for the purposes of section 91(24) does not mean a requirement for the Crown to navigate and accommodate new or existing rights. Not only does the Court’s language not support this assertion, the inclusion of individuals would make such accommodation unmanageable. Neither does section 91(24) imply new obligations of the Crown going forward, for the same reasons. Instead, ‘reconciliation’ for the purposes of section 91(24) appears to be focused on the federal Crown remedying historic wrongs that it has committed against Indigenous peoples, including individuals, whether or not they are section 35 Aboriginal peoples.

*(b) What are the Obligations of Section 91(24)?*

The focus of section 91(24) may be the reconciliation of individuals harmed by the Crown as a result of being Indigenous peoples, however the Crown’s responsibilities with regards to section 91(24) peoples remain unclear.

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<sup>74</sup> *Black’s Law Dictionary*, 8th ed., *sub verbo* “redress”.

<sup>75</sup> *Daniels*, *supra*, note 1, at para. 15.

(i) Alternative — Moral Obligation

The Court's oft reference to residential schools in *Daniels* suggests that the Court is concerned with the Crown's moral obligation to provide remedies for those who have been injured by its historic acts. Though Indigenous peoples have the same rights of action against the Crown, it may be morally objectionable that each should be required to endure the cost, emotional pain, and time associated with such a claim, especially given the advanced age of many survivors. Consequently, the declaration of a moral obligation would be meaningful to affected Indigenous peoples.

It is possible that the Court only intends for section 91(24) to make clear the moral obligations of the Crown to remedy historic wrongs against Indigenous peoples, and address their present implications. The Court cited the observation of the trial judge that Indigenous peoples "are deprived of programs, services and intangible benefits recognized by all governments as needed",<sup>76</sup> suggesting that the federal government was aware of these needs, but avoided moral responsibility by contesting that jurisdiction was held by the provinces. Since the effects of historic wrongs are often disparate and broad, and the current implications may be challenging to address, the Court may recognize that it is not equipped to evaluate and determine optimal forms of redress and assistance. By instead making it clear that the federal government is responsible for addressing historic wrongs and its present implications, the Court provides clarity on Canada's moral obligations, and allows the legislature (being subject to public pressure) to provide meaningful redress and present implications.

If the intention of section 91(24) 'redress' is only to highlight the Crown's moral obligations to Indigenous peoples, it is also implied that the Crown's obligations to such peoples are limited temporally. Since the moral obligation is only triggered where the Crown acts in such a way that requires redress (conceivably on a scale that triggers public moral concern), the Crown's obligations to section 91(24) Indigenous peoples would conclude once reasonable redress was provided. This is not inconsistent with the Court's general tone in *Daniels*: if the purpose is redress, then it is conceivable that such a purpose could be fulfilled.

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<sup>76</sup> *Daniels*, *supra*, note 1, at para. 14.

(ii) Alternative — General Obligation

Instead of asserting only a moral obligation, the Court could be suggesting that while historic wrongs resulted in the need for redress, such redress should be focused on addressing inequality instead of specific harm. Inequality and specific harm may be connected, having been the result of the same misconduct, but a focus on general inequality rather than specific redress will have drastically different consequences. The Court has noted, as previously identified, that some Indigenous peoples “are deprived of programs, services and intangible benefits”.<sup>77</sup> This language is significantly broader than ‘redress’, used elsewhere, and seems inconsistent with some aspects of *Daniels*. For instance, it is unclear how additional programming and services could effectively target those not associated with an Indigenous community. Similarly, how can an obligation to address inequality survive the Court’s assertion that there is no “duty to legislate”?<sup>78</sup>

More significantly, if the objective of section 91(24) goes beyond specific and individual redress, and instead considers broader more fluid concepts like inequality, the obligations on the federal government may continue indefinitely. Though not unreasonable given the intergenerational legacy of Canada’s historic misdeeds towards Indigenous peoples,<sup>79</sup> a broader obligation on the Crown to address systemic inequality would likely require significant and ongoing efforts which in practice may be consistent with the Crown’s existing practices with Aboriginal peoples.

Reconciliation that focused on the general well-being of Indigenous peoples would, necessarily, be less focused on individual harm committed, which sits in contrast to the Courts concern for individuals who are disassociated from their traditional communities and who have fallen through the cracks. Addressing economic disparity would require a focus on education and economic empowerment, activities which may benefit Indigenous communities, but which would likely omit disassociated Indigenous peoples. Such a result does not seem consistent with the purposes and perspectives applied in *Daniels*.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, at para. 15.

<sup>79</sup> *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 132, online: <[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)>.

(c) *Conclusions on Reconciliation*

While the Court in *Daniels* refers to reconciliation, it does not explicitly state what section 91(24) reconciliation comprises and what obligations the Crown has in furthering section 91(24) reconciliation. The Court's stated aim of clarifying where Indigenous peoples should turn for redress is countered by its assertion that the federal government does not have an obligation to legislate. The resulting stalemate suggests that given the complexity of section 91(24), partially created by the broad scope for inclusion of individuals therein, the Court has no intention to dictate the appropriate framework for redress and reconciliation. Rather, it appears that the Court has clarified the obligations of the federal government and will allow the political process to find a resolution, at least for now.

While it may be possible that the Court intends for section 91(24) to address broader inequalities, this is not supported by the text in *Daniels*. While calls for greater funding are a natural outcome of *Daniels* and would be helpful for reconciliation generally, the Court's desired approach seems to be more nuanced given its concern for Indigenous peoples who are otherwise unaffiliated with existing Indigenous communities.

## 6. Provinces, Aboriginal Peoples and Federalism

During a conference in late 2016, one of the authors overheard a provincial representative state that the Canadian provinces were the 'winners' in *Daniels*. Such views of 'winners' and 'losers' as between the provinces and the federal government represent an impoverished view of section 35, reconciliation, the honour of the Crown, and more fundamentally, the legal underpinnings of the Canadian federation.

Following the release of *Daniels*, many argued that funding for Métis communities was likely to increase, with one representative commentator noting that "the federal government will [now] have to justify any distinction in the type and level of services it provides to status Indians, non-status Indians and Métis".<sup>80</sup> This position is not unreasonable. Pursuant to the *Indian Act*, the federal government has maintained a register of First Nations people who qualify as status Indians. Despite lacking a foundation in section 35, this register has been a primary factor

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<sup>80</sup> Claire Truesdale, "Supreme Court of Canada Releases Daniels Decision" (14 April 2016), *JFK Law Corporation*, online: <<http://jfkclaw.ca/daniels-decision/>>.

in determining federal funding allocations. At present, status Indians have turned to the federal government for education and healthcare programs, while non-status and Métis have instead been served, in varying degrees and in some cases with uncertainty, by the provinces.

In *Daniels*, the Court exposed this dichotomy of treatment between status Indians and other Aboriginal peoples as constitutionally unfounded. If, as *Daniels* asserts, section 91(24) includes all Indians, Inuit and Métis, why has the federal government, when acting pursuant to the authority granted to it in section 91(24), distinguished between section 35 Aboriginal peoples when deciding whether to provide services and other support?

On its face, *Daniels* suggests that the federal government will need to justify any disparity in the allocation of funding and benefits between status Indians and other section 35 rights holders.<sup>81</sup> Given that the federal government currently provides provincial-type services to status Indians and Inuit, some have interpreted *Daniels* to mean that the federal government must now take over the provision of services to all Indigenous peoples. However, this interpretation relies on an assumption about the federal government's obligations to Indigenous peoples which is not supported by *Daniels*.

*(a) Declaration Federal and Provincial Governments' Obligations  
Come From Section 35, not Section 91(24)*

The federal government's obligations to Aboriginal peoples are set out in section 35. Section 35 extends to all Aboriginal peoples meeting the test for possessing such rights (as set out in *Van der Peet* and *Powley*<sup>82</sup>), whether status or non-status, as well as to Inuit and Métis peoples. However, these section 35 obligations are not exclusive to the federal governments as section 35 "applies to both provinces and the federal government".<sup>83</sup>

The nature of the relationship between the federal government and Indigenous peoples is distinguished from the relationship between the provinces and Indigenous peoples by reason only of section 91(24). However, section 91(24) does not create obligations to Indigenous peoples in the way that section 35 creates obligations on the Crown to

<sup>81</sup> Such justification may be moral or political justification, but may also include a legal justification as a result of the equality rights found in s. 15(1) of the *Constitution Act, 1867*.

<sup>82</sup> *Van der Peet*, *supra*, note 35; *Powley*, *supra*, note 20.

<sup>83</sup> *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, 2003 SCC 55, at 24 (S.C.C.).

Aboriginal peoples. Section 91(24) has an altogether different purpose. Since it contains no duty to legislate,<sup>84</sup> section 91(24) is not a source of rights for Indigenous peoples, and instead “is about the federal government’s relationship with Canada’s Aboriginal peoples”.<sup>85</sup> As suggested earlier, the nature of any obligation which flows to the federal government as a consequence of section 91(24) is unclear, and may be focused on a moral duty in lieu of a legislative duty.

*(b) Section 91(24) does not Significantly Constrain the Provinces  
From Acting*

In *Daniels*, the Court explicitly stated that “federal authority under section 91(24) does not bar valid provincial schemes that do not impair the core of the Indian power”<sup>86</sup> and that it will “favour, where possible, the ordinary operation of statutes enacted by *both* levels of government”.<sup>87</sup>

As the Court in *Kitkatla* noted, “provincial laws can apply to aboriginal peoples; First Nations are not enclaves of federal power in a sea of provincial jurisdiction”.<sup>88</sup> Even where provincial heads of power like education or healthcare can be shown to be section 35 rights, that should not preclude provinces from legislating, given the Court’s statement in *Tsilhqot’in Nation* that “provincial regulation of general application will apply to exercises of Aboriginal rights ... subject to the s. 35 infringement and justification framework”.<sup>89</sup>

*(c) The Federal Government is Using Section 91(24) to Perform  
Provincial Obligations*

Given that the provinces are able to operate legislative schemes of general application which may impact Indigenous peoples, *Daniels* does more than draw attention to the federal government’s practice of providing disparate levels of resources services to different Indigenous peoples. *Daniels* raises the question, why does the federal government run a parallel scheme of services including education and healthcare for *any* Indigenous peoples?

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<sup>84</sup> *Daniels*, *supra*, note 1, at para. 15.

<sup>85</sup> *Id.*, at para. 49.

<sup>86</sup> *Id.*, at para. 51.

<sup>87</sup> *Id.*

<sup>88</sup> *Kitkatla*, *supra*, note 7, at para. 66.

<sup>89</sup> *Tsilhqot’in Nation*, *supra*, note 6, at para. 150.

Beyond the general obligations in section 91(24), there is no explicit requirement for the federal government to provide education or healthcare to Aboriginal peoples or Indigenous peoples.<sup>90</sup> The provision of education is included as a provincial power under section 93 of the *Constitution Act, 1867*. Similarly, provinces also have broad and extensive powers over the provision of healthcare.<sup>91</sup>

Why then does the federal government provide provincial-type services to some Indigenous peoples? At one time, the federal government's policy of providing provincial-level services was doubtlessly due to section 91(24) and the "watertight compartments"<sup>92</sup> view of federalism. But the landscape of federalism has changed over the years as a result of a "strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues".<sup>93</sup>

The federal government does not have an obligation to provide services like health care and education. Social services fall to the very heart of provincial powers; they are quintessentially local matters, often involving local property.

Without the obligation to provide provincial-type services to Indigenous peoples, *Daniels* presents Canada with a dilemma: should the federal government expand the provincial-type services it offers to all Indigenous peoples at significant cost, or should it abandon its provision of provincial-level services and use funding instead for other issues which are more central to Indigenous rights and reconciliation?

*(d) Daniels Makes Clear the Provinces' Obligations to Indigenous Peoples*

If section 91(24) does not compel the federal government to legislate and does not exclude the provinces from enacting legislation, why then

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<sup>90</sup> However, given that the federal government has exclusive power to make laws in relation to "Indians, and Lands reserved for Indians" (*Kitkatla, supra*, note 7, at para. 67), in instances where legislation is required to uniquely address the needs of Aboriginal peoples, the federal government may have the sole ability to legislate. See also *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian and Northern Affairs Development)*, [2016] C.H.R.D. No. 2, 2016 CHRT 2 (C.H.R.T.).

<sup>91</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2016) (looseleaf revision 2016-1), ch. 32, at 32.1 (Proview).

<sup>92</sup> *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] 1 D.L.R. 673, [1937] A.C. 326 (U.K. P.C.).

<sup>93</sup> *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at para. 27 (S.C.C.).

would provinces expect that Métis and non-status Indians should turn to the federal government for these services? Additionally, what constitutional reason compels the federal government to provide these services?

The earlier suggestion that the provinces ‘won’ *Daniels* was misconstrued. *Daniels* suggests that Canadian provinces cannot hide behind section 91(24) as a basis for not providing equal services and care to *all* citizens of their respective provinces. Any views suggesting that the federal government is solely responsible for providing what would otherwise be provincial services is inconsistent with the growing jurisprudence regarding provincial and federal rights and obligations towards Aboriginal and Indigenous peoples.

Beyond its constitutional foundation, the Court’s approach also has immensely practical value. Provinces are best placed to provide local services like education and healthcare since, in many places, they provide them locally already, are more sensitive to local markets and needs, and as a result of their close proximity, may be more likely to respond to local concerns and developments. In many instances, the federal government’s continuing involvement in these local matters risks increasing local disparity between Indigenous peoples and Canadians.

*(e) A Framework for Reconciliation*

Although not expressly stated, it appears that the Court is setting up a system whereby the federal government can deal with broader matters associated with reconciliation with Indigenous peoples, but without interfering with provincial authority and responsibility for their citizens, including those who are Indigenous. Of course, the anomaly to this practical approach is the reality of the federal *Indian Act* and the provision of what normally would be provincial services (e.g., health care, education) to First Nations and reserve-based governments. The stage may be set for a much-needed dialogue as among the federal government, the provinces and Indigenous peoples about which level of government should be providing core services and which level of government should be focused on broader objectives of redress and reconciliation with Indigenous peoples in Canada.

The Court has laid out a pathway to reconciliation in *Kitkatla, Grassy Narrows* and *Tsilhqot’in Nation*, among others, which increasingly sees Canadian provinces acting within their full capacity, constrained not by section 91(24), but instead by the rights and principles founded on



section 35. Despite suggestions that more money will need to be spent on Indigenous peoples following *Daniels*,<sup>94</sup> the actual result could be the opposite. From a practical perspective, the federal government may be reticent to dramatically expand spending on Indigenous peoples, especially when the full number of potentially eligible persons remains unknown. Even without the evolution in federalism, existing funding would most likely be reallocated from First Nations and Inuit peoples to Métis and other Indigenous peoples.

The emphasis on reconciliation and redress within *Daniels* illuminates the core of the federal government's obligation towards Aboriginal and Indigenous peoples. Reconciliation involves negotiating treaties, and ensuring compliance thereunder. For Indigenous peoples living on reserves, reconciliation means developing structures that allow reserve communities to exercise their Aboriginal and treaty rights and protect the interests of future generations. For Indigenous peoples generally, reconciliation means providing redress for the historic misdeeds that Canada has committed against them as a result of their affiliation with, or identification as, Indigenous peoples and looking forward to ensure Indigenous peoples' interests and those of Canada more generally are properly reconciled.

## II. CONCLUSION

*Daniels* may end up being one of the most important Aboriginal law decisions, not because of the declaration that the Court makes, or those that it chose not to, but because of the insights it provides into the understanding of reconciliation. Reconciliation goes beyond just protecting section 35 rights. It also includes a larger concept of redress for those mistreated as a consequence of being Indigenous peoples. Many historic practices of the federal government are not consistent with section 35 or section 91(24) and are unnecessary, and potentially incompatible, with reconciliation.

*Daniels* lays bare the unfounded historical legacy of the federal government's approach to providing essentially local services to a discrete group of Canadians: status Indian and Inuit peoples. Federalism and section 91(24) have evolved and developed towards the all-encompassing objective of reconciliation. Indigenous peoples are no

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<sup>94</sup> Joanna Smith, "Supreme Court Recognizes Rights of Métis and Non-Status Indians", *The Toronto Star* (14 April 2016), online: <<https://www.thestar.com/news/canada/2016/04/14/supreme-court-recognizes-rights-of-mtis-and-non-status-indians.html>>.

longer an ‘enclave’ of the federal government. They are Canadians and provincial residents. The rights of Aboriginal peoples do not come from inclusion under section 91(24), or from inclusion under the *Indian Act*, but rather are based on section 35, and are, as stated in *Tsilhqot’in Nation*, “a limit on both federal and provincial jurisdiction”.<sup>95</sup>

*Daniels* stands as more evidence that federalism has evolved: it includes both the federal and provincial governments working within their constitutionally mandated powers to respect, and where permitted infringe, section 35 rights. In light of this evolution, *Daniels* could be the slight noise that triggers an avalanche of change, clearing away the historic practices and confines of the *Indian Act* in favour of a fresh, broad and simpler approach focused on reconciliation.

As such, *Daniels* may represent the ultimate opportunity for Canada as a nation to recalibrate its relationship with Indigenous peoples and ensure that all levels of government are undertaking their appropriate roles to ensure that Indigenous Canadians are treated fairly and equitably, as are other Canadians, by both provincial governments and the federal government. Obviously, this is a significant challenge, but one that needs to be addressed head-on if the ultimate objective of reconciliation is to be achieved.

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<sup>95</sup> *Tsilhqot’in Nation*, *supra*, note 6, at para. 141.

